91-423

No. 91 -_____

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

MICHAEL E. HUYGE,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Merit Systems Protection Board have jurisdiction to hear a claim on behalf of a veteran postal employee who, upon reassignment within the Postal Service, was reduced in pay in reliance upon Article 9.1.B.1. of the collective bargaining agreement between the Postal Service and the National Rural Letter Carriers?

2. Does the Postal Service have the right to reduce the pay of the reassigned veteran employee without creating an adverse action within the jurisdiction of the Merit Systems Protection Board?

3. What is the factual predicate under the Civil Service Reform Act necessary for Petitioner to establish jurisdiction of the Merit Systems Protection Board over an alleged adverse action?

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No. 91 -_____

Supreme Court of the United States

October Term, 1991

MICHAEL E. HUYGE,[1]

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Federal Circuit

Petitioner prays that a writ of *certiorari* issue to the United States Court of Appeals for the Federal Circuit to review the judgment in this case filed on June 11, 1991.

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[1] All parties to this action are identified in the caption.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is not yet reported. It is set forth in the Appendix at A 1.

The MSPB Order Denying appellant's petition for review of the initial decision is not reported. It is set out in the Appendix at A 2 - A 4.

The initial MSPB decision has not been officially reported. It is set forth in the Appendix at A 5 - A 16.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on June 11, 1991. (Appendix at A 1). No rehearing or rehearing *en banc* was sought.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254(1) to review a civil judgment.

RELEVANT STATUTORY PROVISIONS

5 U.S.C. Section 1204
(a) The Merit Systems Protection Board shall--

(1) hear, adjudicate or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

5 U.S.C. Section 7511(a)(1)
["employee" means--]

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

5 U.S.C. Section 7512
[This subchapter applies to--]

(4) a reduction in pay; and

5 U.S.C. Section 7701

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

39 U.S.C. Section 1005(a)

(2) The provisions of title 5 relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title. The provisions of this paragraph shall not be modified by any program developed under section 1004 of this title or any collective-bargaining agreement entered into under chapter 12 of this title.

39 U.S.C. Section 1207(c)

(2) The arbitration board shall give the parties a full and fair hearing, including an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel or by other

representative as they may elect. Decisions of the arbitration board shall be conclusive and binding upon the parties. The arbitration board shall render its decision within 45 days after its appointment.

STATEMENT OF THE CASE

Petitioner, Michael E. Huyge ["Huyge"], is a career service employee of Respondent, United States Postal Service ["USPS"]. Huyge was hired by USPS on December 12, 1978. Effective January 17, 1987, Huyge was reassigned to a vacant rural carrier position with no break in service, having been informed by USPS officials and the personnel office that he would retain his pay level. In accepting the rural carrier position Huyge bought a vehicle for rural deliveries and relocated from Minot, North Dakota to Devils Lake, North

Dakota.

After reassignment as a rural carrier Huyge's pay was in fact ultimately reduced by approximately $5,400.00 per year notwithstanding the express language of the Volz Award,[1] Postal Service Bulletin, USPS's Employment & Labor Relations Manual ["ELM"], USPS's express representations, and Huyge's acts in reliance thereon. Huyge attempted to pursue a grievance and received no notice from USPS that the involuntary reduction in pay was an adverse action appealable to the Merit Systems Protection Board ["MSPB"]. The

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[1] The Volz Award was issued pursuant to 39 U.S.C. Section 1207 as an interest arbitration award determining the collective bargaining agreement terms between USPS and the National Rural Letter Carriers' Association ("NRLC"). It was issued on or about January 15, 1985.

bargaining representative refused to accept the grievance on any issue other than the USPS representations issue. Huyge did not participate nor testify in any proceedings on his grievance and in December of 1989 the union notified Huyge that his grievance had been withdrawn[3].

Huyge, upon receipt of the proper forms for the first time, appealed to the Merit Systems Protection Board ["MSPB"] to resolve his dispute with the USPS over his involuntary reduction in pay to the new hire entry level pay, Step B for a rural carrier.

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[3] An arbitration was held solely on the misrepresentation issue. ["Zumas Award"]. As a part of the arbitration USPS and the union stipulated that there was no dispute between them on the interpretation of the contractual provision in Article 9.1.b.1. No presentation was made regarding any interpretation of the collective bargaining agreement determined in the Volz Award.

Huyge is a preference eligible veteran, within the meaning of 5 U.S.C. Section 7511(a)(1)(B) and 5 C.F.R. Section 752.401(c)(3) and, as such, has the right by virtue of 39 U.S.C. Section 1005(a)(2) to seek the review of any adverse action with the MSPB. A reduction is pay is an adverse action[4].

From the inception of the USPS, under the Postal Reorganization Act of 1970[5] and up to April 24, 1985, nearly four (4) months after the Volz Award was issued in January of 1985, no career PS Schedule employee becoming a new rural carrier lost any earned pay steps. All

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[4] 5 C.F.R. Section 1201.3 (1990); 5 U.S.C. Section 7512(4), specifically provide for covering an action of a reduction in pay by the employing agency.

[5] 39 U.S.C. Section 101. *et seq.*

career service PS schedule employees of USPS reassigned to vacant rural carrier positions retained all earned pay steps in the setting of their pay rates as rural carriers. The procedures in place with USPS for career employees to be reassigned to vacant rural carrier positions have not changed since the 1981 collective bargaining agreement. All incumbent employees must take an open competitive examination and be reached on the register.

Between April 24, 1985 and November 30, 1988 the USPS reassigned many PS schedule employees, such as Huyge, as rural carriers at their attained pay step. In most instances career employees reassigned after April 24, 1985, including Huyge, were ultimately reduced

to the Step B pay level before the end of 1988. Huyge was reduced to Step B, on or about February 6, 1987, restored to his proper higher step and reduced again in March of 1987, all after his reassignment.

The essence of his appeal to the MSPB was whether or not the protections of a veteran postal employee under federal law against adverse actions may be circumvented by an unwarranted *post hoc* interpretation of the collective bargaining agreement by the union and employer[4]. In the instant case Huyge's

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[4] The Volz Award was the first time that 39 U.S.C. Section 1207 had been invoked to achieve a bargaining agreement covering rural carriers and specifically provided:

> We adopt a position on this issue which is consistent with the Kerr Award. This board follows the lead of the Kerr board and establishes for **new hires** two new pay grades below those for incumbent rural carriers.

grievance was only pursued based upon the alleged "erroneous information" given to him by representatives of the employer. The employer's position in the several grievances, acquiesced in by his union representatives, was that the new entry level Step B was the proper pay step for career service employees reassigned to vacant rural carrier positions. The employer's position before the MSPB and Federal Circuit has been to cite the Zumas Award as determining the placement of Huyge and others reassigned in Step B. Notwithstanding *dicta* in the Zumas Award, the arbitrator acknowledged and USPS conceded that the only issue submitted to arbitrator Zumas was whether or not the

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Volz Award at Para. 2. p. 4 (emphasis supplied).

USPS was subject to equitable or promissory estoppel for its representatives' statements. Zumas determined the equitable estoppel issue adversely to the employees and the union withdrew all pending grievances related to this issue, including Huyge's.

Huyge, upon receiving the appropriate forms, appealed to the MSPB's Denver Regional Office on the grounds that the reduction in pay was an adverse action. On May 31, 1990, the MSPB's regional office dismissed the appeal as outside the Board's jurisdiction. (A 5 - A 16).

Huyge filed a timely petition for review with the MSPB which was denied on September 27, 1990. (A 2 - A 4). Thereafter, Huyge filed a timely appeal

to Federal Circuit, pursuant to 5 U.S.C. Section 7703(b)(1). The judgment of dismissal was affirmed *per curiam* by the Court of Appeals, without opinion, on June 11, 1991. (A 1).

REASONS FOR GRANTING THE WRIT

The Decision of the Federal Circuit Avoided Determining Several Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court

A. This case presents an important questions of first impression under the Postal Reorganization Act and Civil Service Reform Act

With the advent of the Postal Reorganization Act [PRA] the USPS became a hybrid organization retaining some of the characteristics of a federal sector employer and acquiring some characteristics of a private sector employer. In a departure from federal

sector employment the USPS was allowed to negotiate with the bargaining unit representatives, *inter alia*, the wage scales to be paid in each craft. In 39 U.S.C. Section 1207, which provides for binding interest arbitration, the PRA adopted a different approach from the private sector to the traditional strike when negotiations breakdown.

The interest arbitration procedures were first used in 1984 when the USPS and several unions, including the rural carriers representatives, could not reach new contractual agreements. The Kerr Award,[1] which preceded the Volz Award by approximately one (1) month, adopted a

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[1] The Kerr Award is the interest arbitration award pursuant to 39 U.S.C. Section 1207 that covered some USPS employee unions, but established the principal basis for new below entry level pay steps for new hires.

compromise which created two (2) new pay steps for new hires below the previous entry level pay steps, Steps B and C. Section 1207 of the PRA provides that the decision of the interest arbitration panel shall be the contract. 39 U.S.C. Section 1207(c)(2). In the instant case the plain meaning of the Volz Award must be swept away to reach the result of applying Article 9.1.B.1. to reduce the pay of incumbent career service employees to the new below entry level pay step[8].

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[8] Section 1006 of The Postal Reorganization Act, Title 39 U.S.C. Section 1006, provides each postal employee with the right of transfer and mandates that the Postal Service, "...provide a maximum degree of career promotion opportunities for ...employees...." These are general pronouncements, with no specific directives for compliance. The economic deprivation of an individual postal worker exercising his right of transfer is contrary to the mandate of 39 U.S.C. Section 1006, and creates a conflict between federal law and the interpretation of the contract adopted by USPS. Under the Supremacy Clause the contract must either give way or be

While the Federal Circuit issued a *per curiam* affirmance of MSPB's dismissal for lack of jurisdiction, the arguments focused on its earlier decision in *McGarigle v. United States Postal Service*, 904 F. 2d 687 (Fed. Cir. 1990). In *McGarigle* the court affirmed a dismissal for lack of jurisdiction after a hearing where there were conflicts in the testimony resolved adversely to the employee. In essence the *McGarigle* decision was based upon credibility determinations by the MSPB administrative judge and reflect the axiom that hard cases make bad law. In the instant case the MSPB declined to hold a hearing, instead entering a jurisdictional

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interpreted in harmony with Section 1006 of the PRA.

dismissal.

The reduction in pay and step to Step B of the RC Schedule is not required by the Volz award. See: *Stenuis v. United States Postal Service*, MSPB Boston Regional Office, Docket No. BN0752871011 (Oct. 13, 1987), set forth in the Appendix at A 17 - A 36. Under the mandates of 39 U.S.C. Section 1207 the Volz award became the collective bargaining agreement. The Respondent initially interpreted the Volz Award and Article 9 as establishing the new entry level pay steps only for those rural carriers newly hired from the outside after January 15, 1985. The Postal Bulletin issued contemporaneously with the Volz Award is entirely consistent with the reduction in pay suffered by

Huyge being an adverse action. See, Postal Bulletin, PB 21501 (2/15/85). This interpretation was also consistent with the existing ELM Section 424.221. However, sometime between January, 1985 and April, 1985, the NRLC and Postal Service reached an informal, unrecorded accord on the interpretation of Article 9.1.B.1. Under this second, unpublished interpretation of the contract the reduced pay and step are applicable to any "new" rural carrier, even those reassigned from the PS Schedule with years of service. In other words, Respondent redefined "new appointee" to mean "any person", ignoring the mandates of the Volz Award and the consistent

provisions of the ELM.[9] Whether this interpretation is consistent with the PRA is a question which is as yet unanswered.[10] In *Kaiser v. United States Postal Service, et al.*, 908 F.2d 47 (6th Cir. 1990), *cert. denied* 111 S.Ct. 673 (1991), the Sixth Circuit rejected the argument that a private cause of action was created under 39 U.S.C. Section 1006

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[9] In the only case found which addresses this precise issue, Administrative Law Judge Harvey of the Merit System Protection Board determined that a move from a PS Schedule job to an RC Schedule letter carrier position was a reassignment governed by Section 424.221 of the ELM. *Stenuis v. United States Postal Service*, MSPB Boston Regional Office, Docket No. BN0752871011 (Oct. 13, 1987).

[10] Federal statutes take precedence over terms and conditions set forth in collective bargaining agreements ["CBA"]. Constitution of the United States, Art. VI, Cl. 2. If Article 9 of the CBA mandating salary reductions for career postal employees upon reassignment as rural carriers is in conflict with the letter or intent of 39 U.S.C. Section 1006 or 1207 the contractual provision must fall.

and never reached the merits of this issue.[11] Although the PRA has been in effect for twenty (20) years, no court has addressed the permissible parameters governing the Postal Service and NRLC's interpretation of collective bargaining agreements arising out of the interest arbitration provision. 39 U.S.C. Section 1207.

This Court should grant this petition so as to determine the scope, effect and meaning of the interest arbitration provision and the post-award latitude given the USPS and NRLC to adopt interpretations contrary to the award.

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[11] *Stupy v. United States Postal Service, et al.*, Case No. 90-15496 pending in the Ninth Circuit and *Glenn, et al. v. United States Postal Service, et al.*, Case No. 90-3751 pending in the 11th Circuit raise *inter alia* the 39 U.S.C. Section 1006 issue.

B. The threshold burden on appellants to the MSPB to establish jurisdiction raises significant issues involving statutory construction and the administration of the Civil Service Reform Act and the Postal Reorganization Act

Huyge's appeal to the MSPB was greeted with a notice that the MSPB had questions concerning the jurisdiction of the MSPB. The response of Petitioner placed by competent affidavit stated to the MSPB exactly what he knew about the grievance, it was withdrawn in December, 1989. The difficulty encountered by Huyge in further responding without a hearing was that he met all the other tests of an adverse action for a covered employee. The USPS countered with the Zumas Award which in *dicta* stated that Article 9.1.B.1. did provide for a reduction in pay to Step B. Upon the

receipt of the request Huyge provided the information that he had and in terms of the scope of the Zumas Award a question of fact on the applicability of this award to "interpreting the contract" required a hearing on any jurisdictional concern of MSPB. As a preference eligible employee of the USPS, Huyge could invoke the grievance procedure and also appeal to the MSPB. *Bacashihua v. MSPB*, 811 F.2d 1498, 1502 (Fed. Cir. 1987).

The cases relied upon to establish that no jurisdiction existed are dissimilar to the instant case, which raises the central issue of what has to be proven by an appellant to show jurisdiction. In *Maddox v. MSPB*, 759 F.2d 9 (Fed. Cir. 1985), the court upheld

a finding of no jurisdiction by the MSPB where the action was a reassignment without any reduction in title, grade or pay, and therefore outside of the covered actions set forth in 5 U.S.C. Section 7512. The *Maddox* decision presents a significantly different picture than this case where a reduction in pay is a specified covered action. 5 U.S.C. Section 7512(4). In reviewing each opinion relied upon below, as affirmed by the Federal Circuit, jurisdiction was denied where the appellant could not show coverage under the definitions of employee in 5 U.S.C. Section 7511(a)(1). See, *Saunders v. MSPB*, 757 F.2d 1288 (Fed. Cir. 1985); *Stern v. Dept. of the Army*, 699 F.2d 1312 (Fed. Cir. 1983). Where there were any issues of fact a

hearing was held. See, *Burgess v. MSPB*, 758 F.2d 641 (Fed. Cir. 1985); *Collaso v. MSPB*, 775 F.2d 296 (Fed. Cir. 1985). Huyge was not accorded a hearing. And, with respect to the issue presented, to-wit: the proper application of the collective bargaining agreement under the Volz Award, MSPB concluded without any attempt to resolve the conflicting facts:

> However, it is essentially undisputed that the appellant's pay as a Rural Carrier was set in accordance with Article 9.1.B.1. of the negotiated agreement between the agency and the National Rural Letter Carriers Association.

Appendix at A-7. Petitioner never received an opportunity to present the evidence on the merits, the MSPB relied exclusively on the Zumas Award to determine the issue. The deprivation to Huyge and other veterans employed by the

Postal Service who have lost substantial earnings should not turn on an assumption, but on a record after hearing. The burden placed on Huyge on the jurisdictional issue is so onerous that no hearing will ever be held. The Civil Service Reform Act of 1978 ["CSRA"] was not intended to raise arbitrary barriers to resolving matters within the jurisdiction of the MSPB. Huyge demonstrated clearly that he was an employee within the meaning of the CSRA, presented an issue covered by MSPB under the CSRA and requested a hearing to adduce further evidence. Additionally, the decisions below ignored the factual and legal analysis in *Stenuis, supra,* on the precise issue presented here, but rather found the *dicta* in the Zumas Award

as determinative.

The *McGarigle, supra,* decision is the linchpin to whether or not jurisdiction exists. In the absence of a hearing Huyge has been denied any opportunity to show that there are factual differences or develop a record to support consideration of overruling what the Federal Circuit views as binding precedent. See: Fed. Cir. R. 35. Significantly, the arbitration proceeding resulting in the Zumas Award occurred during the pendency of the appeal in *McGarigle* and was not a part of the record in *McGarigle* before MSPB. The Federal Circuit, nonetheless, relied upon the Zumas Award as dispositive of the issue, even though no evidence was taken at a hearing to show the limited scope of

this arbitration.

This Court has given great deference to an arbitrator's interpretation of a collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 (1960). While *Enterprise Wheel* gives great deference to an arbitrator's duty to interpret the contract, it does not support the wholesale conversion of anything said in an arbitration award into a binding ruling with respect to issues not presented. It is clear that the Zumas Award attempted to apply general principles of law on governmental estoppel and not interpret the meaning of the contract. See: *Office of Personnel Management v. Richmond*, 110 S.Ct. 2465 (1990).

Even in cases where the Federal Circuit has found sufficient support for the application of collateral estoppel to an employee's claim to the MSPB arising from a prior arbitration, the employee received a hearing with MSPB. *Kroeger v. United States Postal Service*, 865 F.2d 235 (Fed. Cir. 1988). In the instant case the assumptions made fail to establish the standards necessary to delineate when an employee, such as Huyge, has met his burden on jurisdiction and is entitled to a hearing. This important question needs to be addressed here, as there are significant factual issues that must be developed in order to distinguish or overturn the *McGarigle* decision.

C. The application of equitable estoppel against the government should be made on a fully developed record

Huyge filed a grievance and never participated in the process, receiving a letter notifying him that the grievance was withdrawn in December of 1989 from the NRLCA. This Court in *Richmond,* 110 S.Ct. 2465 (1990), while not deciding the issue conclusively, held that no estoppel will lie against the government where the representations were contrary to federal law. The circumstances presented in the instant case will require revisiting when estoppel will lie, at least, against the USPS for its acts, and representations withdrawn in a manner contrary to federal law. It is undisputed on the record in this case that USPS officials represented to Huyge that he would receive his pay

steps[12]. This evidence cannot even be developed unless there is a hearing. Even in *Kroeger, supra,* the MSPB held a hearing to determine whether the arbitration fully litigated the factual issue appealed to the MSPB.

In *Richmond* a full hearing record was made on the circumstances surrounding the cancellation of disability retirement benefits to the claimant before any decisions were made. Huyge's opportunity has been effectively denied where no hearing was held and no examination of what the Zumas Award covered was ever undertaken. Petitioner submits that upon

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[12] There is also a substantial body of other evidence from the ELM Section 424.221; Postal Bulletin, PB 21501 (2/15/85), published at the time of the Volz Award; the Volz Award; and the Congressional intent with 39 U.S.C. Section 1006 and 1207(c)(2), which support a claim of estoppel on behalf of the Petitioner.

remand this case will present sufficient facts to show that the USPS is subject to estoppel in this case and potentially on this issue. The USPS argued that *Stenuis, supra,* an unappealed initial decision, is entitled to no precedential value. If cited as a dispositive decision of the MSPB this is correct, however, the same considerations that applied in *Kroeger* should also collaterally estop the USPS from re-litigating the issues presented only when it prevails. *Stenuis* predates every other decision on the reassignment issue, USPS had a full opportunity to litigate the issue, and the issue presented is identical to the issue here.

A determination of this issue is essential in order to settle the

questions presented. The Court's direction and guidance to the lower courts on this question require an examination of these related areas of unsettled law, which affect veterans working in the postal service.

D. The Federal Circuit effectively denied the right to a decision on the merits for many veteran postal employees and involves millions of dollars

The questions presented for review are of great fiscal importance and the decision below places more than 1,400 veterans reassigned rural carriers in an anomalous and inequitable position. Since the Volz interest arbitration and the adoption of Article 9 of the collective bargaining agreement more than 2,060 career postal workers have been reassigned to rural carrier routes.

Virtually all of the employees reassigned after April 24, 1985, were ultimately placed in Step B of the RC Schedule. Although promised pay and rate retention, each of the veteran postal workers ultimately suffered pay reductions of thousands of dollars per year. While the application of Step B to career postal workers reassigned to rural routes may have saved Respondent Postal Service several million dollars in labor costs, it has been at the expense of a group of dedicated, long service employees; employees with a Congressional guarantee requiring USPS to maximize transfer and promotional opportunities.

The substantial revenue impact of this decision is not limited to those employees who have already been

reassigned. All career postal workers who, in the future, are reassigned to vacant rural carrier positions will be forced to suffer dramatic pay reductions. The decision below places substantial financial burdens on these career postal workers. We do not believe such financial burdens should be assumed in the absence of a review by this Court of the ruling below.

The new era for the USPS reflected in the Postal Reorganization Act is not implemented by encouraging misrepresentations or economic punishment on postal workers who struggled to earn their pay steps. Congress concurred that one of the evils to be addressed with the

PRA was to reduce the time periods[13]. The application of the Step B of the RC Schedule pay scale to career PS Schedule postal employees has the effect of totally undoing not only Congressional purpose, but also the interest arbitration provision of the PRA. Those who cannot afford to suffer a reduction in pay must forebear from making a personal career choice enhanced through job reassignment. There are no similar economic penalties extracted from other federal or postal career employees who choose career transfer and promotional opportunities. More importantly, thousands more postal workers will

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[13] 116 Cong. Rec. H27602, H27604 (August 6, 1970) (statement of Congressman Derwinski); 116 Cong. Rec. S26955 (August 3, 1970) (statement of Sen. McGee).

continue to suffer the same plight, with no guidance from the judiciary, unless this Honorable Court grants this writ and reviews the decision of the Federal Circuit.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Federal Circuit and settle the critical questions of statutory construction involved in the

administration and interpretation of the Civil Service Reform Act and Postal Reorganization Act.

Respectfully submitted,

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September, 1991
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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-3046

MICHAEL E. HUYGE,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
in CASE NO(S). DE07529010294
This CAUSE having been considered, it is ORDERED and ADJUDGED:

Per Curiam (RICH, ARCHER, and MAYER, Circuit Judges.

AFFIRMED. See Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

/s/
Francis X. Gindhart, Clerk

DATED JUN 11 1991

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL E. HUYGE, Appellant,	)	DOCKET NUMBER DE07529010294
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	DATE: Sep 27, 1990

Bruce B. Elfvin, Esquire, Cleveland, Ohio, for the appellant.

Andrew C. Friedman, Esquire, Chicago, Illinois, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on May 31, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. Section 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. Section 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, which ever receipt occurs first. *See* 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

/s/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

MICHAEL E. HUYGE, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER DE07529010294 DATE: May 31, 1990

Bruce B. Elfvin, Esquire, Elfvin & Besser, Cleveland, Ohio, for the appellant.

Violet L. Flemmer, Bismarck, North Dakota, for the agency.

BEFORE

Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant seeks Board review of an alleged reduction in pay. *See* Appeal

A 6

Record, Tab 1.

The appellant was informed that his petition for appeal appeared to be outside the Board's subject matter jurisdiction and was given the opportunity to present evidence and argument showing such jurisdiction.[1] The appeal record was closed on May 25, 1990.[2]

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[1] In acknowledging the petition for appeal, the Board specifically informed the appellant that it might not have jurisdiction over his claimed reduction in pay. And, the agency's response to the appeal moved for dismissal on jurisdictional grounds.

Thus, the appellant was fully informed of the jurisdictional question of his appeal. And, he was also informed that it was his burden to demonstrate Board jurisdiction. *See Webb v. Veterans Administration,* 29 M.S.P.R. 649, 651 (1986); *see also Burgess v. Merit Systems Protection Board,* 758 F.2d 641, 643 (Fed. Cir. 1985).

[2] Although the appellant requested a hearing, no hearing was held in this matter. The right to a hearing provided in 5 U.S.C. Section 7701(a)(1) is only granted in those cases in which the Board has jurisdiction or in those

For the reasons stated below, the appeal is DISMISSED as outside the Board's jurisdiction.

JURISDICTION

Factual background

The appellant was employed as a Custodian at the Minot, North Dakota, Post Office. In 1986, the appellant applied for and was accepted into the position of Rural Carrier. The appellant was assigned to such a position in Devils Lake, North Dakota, in early 1987.

It is essentially undisputed that at the time of his application for and appointment to the Rural Carrier position the appellant was told by agency

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cases where the appellant alleges facts which, if proven, would establish Board jurisdiction. *See Viloria v. United States Postal Service,* 1 M.S.P.R. 697, 698 (1980); *Murray v. Defense Mapping Agency,* 1 M.S.P.R. 350, 351 (1980). Neither situation exists here.

officials that his salary would be approximately $26,000 per year. However, after entering into the position, the appellant's salary was set at about $20,000 per year. The appellant did receive one paycheck at the higher rate before the "error" was discovered.[3]

Subsequently, the appellant and 10 other similarly situated employees filed a grievance within their agency.[4] However, in November 1989, an arbitrator denied the grievance. Then, on April 22, 1990, the appellant filed the instant

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[3] The agency later waived collection of this overpayment.

[4] Unlike other Federal employees, Postal Service employees may file both a grievance within their agencies and an appeal to the Board at the same time, subject to meeting the Board's filing requirements. *See Lucas v. United States Postal Service*, 39 M.S.P.R. 459, 461 (1989); *Waters v. United States Postal Service*, 36 M.S.P.R. 683, 684 (1988).

appeal with the Board, alleging that the agency action constituted an adverse action under 5 U.S.C. Section 7511.[5]

The appeal is not within the subject matter jurisdiction of the Board

The jurisdiction of the Merit Systems Protection Board is not plenary, but is limited to those actions which are made appealable to it by law, rule or regulation.[6] *See* 5 U.S.C. Sections 1205(a)(1) [*sic* 1204(a)(1)] and 7701(a);

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[5] The parties argue over whether there is good cause for the late filing. However, because of the finding that the appeal is not within the subject matter jurisdiction of the Board, no finding has been made on the timeliness issue.

[6] Both parties cite 5 C.F.R. Section 1201.3 (1990) as a basis for Board jurisdiction. However, the cited regulation is a mere listing of some of the areas over which the Board does have jurisdiction. *See Royals v. United States Postal Service*, 31 M.S.P.R. 184, 185-86 (1986). It does not serve, in and of itself, as a basis for such jurisdiction.

Collaso v. Merit Systems Protection Board, 775 F.2d 296, 297 (Fed. Cir. 1985); *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985); *Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985). And, the appellant has the burden of proving that the Board has jurisdiction over the matter raised. *See* 5 C.F.R. Section 1201.56(a)(2)(ii); *Maddox*, 759 F.2d at 10; *Stern v. Department of the Army*, 699 F.2d 1312, 1314 (Fed. Cir. 1983), *cert. den.*, 462 U.S. 1122 (1983).

The appellant argues that the agency action of setting his pay about $6,000 lower than he had been promised constituted an adverse action because it was a reduction in his basic rate of

pay.[7] However, it is essentially undisputed that the appellant's pay as a Rural Carrier was set in accordance with Article 9.1.B.1. of the negotiated agreement between the agency and the National Rural Letter Carriers Association.[8] *See* Appeal Record, Tab 6-

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[7] In support of his claims, the appellant has submitted a copy of the initial decision in *Stenuis v. United States Postal Service*, MSPB Docket No. BN07528710177 (October 13, 1987). However, this is an initial decision and, as such, has no precedential value. *Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

[8] The arbitrator found that the appellant's pay was properly set at the lower level. And, while this decision is not entitled to application of collateral estoppel, the Board does defer to such arbitration decisions and will set them aside only where the appellant shows that the arbitrator erred in interpreting civil service law, rules or regulation. *Schrider v. United States Postal Service*, 36 M.S.P.R. 650, 653 (1988). No such showing -- or even an allegation -- has been made here.

The appellant does argue, however, citing *Stenuis*, that Section 424.221 of the agency's Employee and Labor Relations Manual applies to this case and mandates a higher rate of pay.

2E. Further, 5 C.F.R. Section 752.401(b)(15) excludes from adverse action coverage a reduction in the basic rate of pay from a rate which is contrary to law or regulation.[9] *See Lemon v. Department of Labor*, 44 M.S.P.R. 43, 47-48 (1990).

Because the rate promised to the appellant was contrary to the negotiated agreement, adjustment of that pay to the rate mandated by the agreement cannot be

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However, the appellant has failed to provide a copy of the cited provision. And, it is not clear that the copy of this section provided by the agency, dated March 17, 1983, applies to this case. *See* Appeal Record, Tab 6-2G. Moreover, I note that Section 424.211 (c), which provides for the assignment of a present postal employee to a Rural Carrier position is permissive in setting the pay level, using the term "may" in describing the agency's options for pay setting. *See* Id.

[9] The Board will treat provisions of a negotiated agreement in the same manner as agency regulations. *See Williams v. Department of Health and Human Services*, 29 M.S.P.R. 525, 527 (1985).

considered an adverse action. Thus, the appeal is outside the Board's jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/
Steven L. Chaffin
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 5, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court

of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial

decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

MICHAEL J. STENUIS, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER BN07528710177 DATE: October 13, 1987

Michael J. Stenuis, Ashburnham, Massachusetts, pro se.

Donald J. Lavallee, Worcester, Massachusetts, for the agency.

BEFORE

Rosemary E. Harvey
Administrative Judge

INITIAL DECISION

Appellant filed an appeal alleging that the agency improperly reduced his pay. For the reasons below, the agency's action in reducing appellant's pay is

REVERSED.

ANALYSIS AND FINDINGS

Record evidence shows that appellant was appointed to a position as a Distribution Clerk in October 1984. In December 1985 appellant accepted a reassignment to a position as a Rural Carrier. Prior to accepting the reassignment, appellant was assured by the agency that if he accepted the reassignment to the Rural Carrier position he would suffer no loss of pay. However, in April 1986 the agency reduced appellant's pay by approximately six thousand dollars per year. The agency informed appellant that this reduction in pay was necessary because of a provision in the collective bargaining agreement between the National Rural Letter Carriers' Association and the agency.

According to Article 9.1.B.1. of that agreement, all new Rural Carrier appointees would start at the new Step B salary level. This new Step B level was approximately six thousand dollars less than appellant had been earning as a Distribution Clerk.

With his appeal, appellant submitted a copy of Section 424.221 of the Employee & Labor Relations Manual (E&LRM) which states that a postal employee who is reassigned from a position under the PS schedule to a Rural Carrier position is entitled to maintain the rate of pay he had in his PS position. Appellant argued that ARticle 9.1.B.1. did not apply to him because, although he was a new Rural Carrier, he was not a new appointee to the Postal Service.

In an order issued on July 14, 1987,

I informed the parties that, based upon my review of Section 425.221 of the E&LRM, it appeared to me that appellant was entitled to retain his basic rate of pay as a Distribution Clerk. If appellant were entitled to retain his basic rate of pay, then the agency's action in reducing his pay would be an adverse action. If the action were taken without giving appellant the required procedural protections of 5 U.S.C. Section 7513, the action would be reversible because of harmful procedural error. *See Hall v. U.S. Postal Service,* 26 M.S.P.R. 233 (1985).

On the other hand, I noted that 5 C.F.R. Section 752.401(c)(11) might apply to this case. Under 5 C.F.R. Section 752.401(c)(11), reduction of an employee's rate of pay from a rate which

is contrary to law or regulation to a rate which is required or permitted by law or regulation, is excluded from those adverse actions appealable to the Board. If this regulation applied to this case, the Board would lack jurisdiction because the reduction of appellant's pay would not be considered an adverse action. I provided both parties with an opportunity to respond to this order.

In its response, the agency asserted that 5 C.F.R. Section 752.401(b)(11) applied to this case and, thus, the Board lacked appellate jurisdiction. The agency argued that in April 1986 when it established appellant's rate of pay at the new Step B in the Rural Carrier position, it followed the provisions of the collective bargaining agreement between it and the Rural Letter Carriers'

Association. The agency noted that Article 9.1.B.1 of the collective bargaining agreement states that "Effective January 19, 1985, all new regular carrier appointees will begin at Step B, except for substitute rural carriers who convert to regular status." (emphasis supplied). The agency alleged that it was the mutual understanding between it and the Rural Letter Carriers' Association that Article 9.1.B.1 applied to all new Rural Carrier appointees whether they came to the position from outside or inside the Postal Service.

The agency also noted that the collective bargaining agreement in Article 9.2.A.1.u. states the following: "In the event the provisions of this section conflict with any Postal Service regulation, manual, or handbook, the

provisions of this section will be deemed controlling." *See* Appeal File, Tab 3-1B. The agency argued that this statement referred to Article 9.1.B.1. and thus superceded the E&LRM section cited by appellant.

Finally, in a conference call I had with the parties on September 14, 1987, the agency representative argued that because Article 9.1.B.1. contained only one exception, i.e., substitute Rural Carriers who convert to regular status are not subject to the new Step B salary level, it must necessarily follow that all other persons who become Rural Carriers are included in it.

In his response, appellant reiterated his position that Article 9.1.B.1 is not applicable to him because he was not a new appointee to the agency.

Appellant argued that he was reassigned to the Rural Carrier position as a lateral transfer and that, under Section 424.221 of the E&LRM, he was entitled to salary protection. Appellant further argued that the agency should be estopped from following the provision of the collective bargaining agreement because it had assured him that he would suffer no loss of pay if he transferred to the Rural Carrier position. He argued that the agency should be held accountable for its failure to advise him correctly and for its failure to be aware of the governing regulation.

After consideration of all of the above, I find that 5 C.F.R. Section 752.401(c)(11) does not apply to this case because appellant's reduction in pay was not from a rate contrary to law or

regulation to a rate which is required by law or regulation. I do not find that Article 9.2.A.1.u. of the collective bargaining agreement refers to Article 9.1.B.1. of the agreement as contended by the agency. Article 9 contains two sections entitled as follows: "**Section 1. Salaries and Wages**" and "**Section 2. Compensation, Allowance, and Fees.**" Paragraph u. appears under Section 2.A.1. I find that paragraph u. refers only to Section 2 of Article 9 and not to Section 1 of Article 9. Section 1 of Article 9 does not contain language stating that its provisions are controlling if any of them conflict with another Postal Service regulation or manual. Furthermore, the agency submitted no evidence to support its allegation that it is the mutual understanding between it and the Rural

Letter Carriers' Association that Article 9.1.B.1. applies to everyone who comes to the Rural Carrier position whether from inside or outside the agency. Thus, I find no merit to the agency's argument that Article 9.1.B.1. supercedes Section 424.221 of the E&LRM.

Furthermore, I find merit to appellant's argument that he is not a "Rural Carrier appointee" under the provisions of Article 9.1.B.1. Appellant's PS-50 indicates that he was reassigned to the Rural Carrier position. *See* Appeal File, Tabs 1 and 3-2. It does not state that he was appointed to it.

In addition, in the two pages of the E&LRM which appellant submitted with his appeal, there is a distinction made between a "...present postal employee who receives an <u>appointment</u> as a regular

rural carrier..." and a "...postal employee who is reassigned from a position under the PS schedule to a rural carrier position..." *See* Section 424.211(c) and Section 424.221 respectively (emphasis supplied). According to these sections, the employee who receives an appointment can be placed in any step for the route up to the step which is less than one full step above his highest previous basic salary whereas the employee who is reassigned is placed in the step of the Rural Carrier schedule which equals his basic salary. Thus, the appointee may receive a salary that is less than his present salary whereas the reassignee will not receive anything less than his current salary. This distinction, I find, lends support to appellant's argument that as a reassignee

to the Rural Carrier position he does not fall within the provision of Article 9.1.B.1. which covers appointees and sets their salary at the new Step B.

The agency's argument that appellant is included in Article 9.1.B.1. because he does not fall within its one exclusion might have some merit were it not for the distinction made between "appointees" and "reassignees" in the E&LRM. Furthermore, salary protection to Substitute Rural Carriers who convert to Regular Carrier positions was granted in Section 424.21 of the E&LRM, entitled "Appointment." Thus, in the E&LRM, Substitute Rural Carriers who convert to Regular Carrier positions are considered to be appointees. If they are considered appointees, they would be covered by Article 9.1.B.1. unless excluded. Thus,

it makes sense that they are the only group specifically identified as being excluded from the new lower Step B salary level.

Based upon all of the above, I find no merit to the agency's argument that appellant, as a reassignee, is covered by Article 9.1.B.1 simply because he does not fall within the one specific exclusion contained in it.

Although the agency did not allege that Article 19, Section 1 of the collective bargaining agreement had any bearing on this case, I find it appropriate to mention it here. That section states the following: "Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they

apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect...." Based upon the distinction between an appointee and a reassignee and the fact that Article 9.1.B.1. refers only to appointees, I find that Section 424.211 of the E&LRM does not conflict with the collective bargaining agreement. Thus, I do not find that Article 19, Section 1 applies to this case.

On the basis of all of the above, I find that appellant is not affected by the provision of Article 9.1.B.1 that established a new Step B for the Rural Carrier position. I find that appellant is entitled to the salary protection granted him in Section 424.221 of the E&LRM. Thus, I further find that the

agency has not shown that it reduced appellant's rate of pay from a rate which was contrary to law or regulation to a rate which was required or permitted by law or regulation as provided in 5 C.F.R. Section 752.401(c)(11). Furthermore, the agency's action in reducing appellant s pay was an adverse action. There is no dispute that the agency effected the reduction in pay without using the adverse action procedures outlined in 5 U.S.C. Section 7513. Thus, the action is reversible because of harmful procedural error. *See id.*

In my July 14, 1987 order to the parties, I informed them that I was prepared to find that a waiver of the timeliness requirement in filing an appeal with the Board was warranted. I noted that appellant filed his appeal

almost 14 months late. However, there was no indication in appellant's appeal that the agency ever told him that he could file an appeal with the Board.

I provided the agency with an opportunity to present evidence and/or argument to show cause why I should not waive the timeliness requirement. The agency did not submit any evidence and/or argument on the timeliness issue.

Appellant indicated in his petition for appeal that he had been protesting his reduction in pay since it occurred and had been pursuing avenues which he thought would help him in overturning the action. Appellant stated that he contacted his union representative and various personnel in the Postal Service immediately after his pay was reduced. The only answer he ever received was that

Article 9.1.B.1 of the collective bargaining agreement was controlling in his case and that he had no recourse. Appellant enclosed a copy of a letter he wrote to Senator Edward Kennedy on April 28, 1986 seeking his assistance. Appellant also stated that he contacted the agency's Equal Employment Opportunity Counselor in May 1986 to see if he could offer any assistance. It was months before he got an answer that nothing could be done. Appellant did not state how he found out about the Board and that there was a possibility of filing an appeal with the Board.

After consideration of all of the above, I find that appellant exercised due diligence in pursuing his complaint and seeking redress for what he believed was an injustice done to him. The agency

has presented no argument that it will suffer substantial prejudice by waiving the timeliness requirement. The outcome of this case was determined by the written provisions of the E&LRM and the collective bargaining agreement and did not depend upon people's memories or recollections of events. Thus, the passage of time between the reduction in pay and the filing of the appeal did not affect the case. Therefore, I find that good cause has been shown to waive the timeliness requirement for filing an appeal with the Board. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180 (1980).

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the

reduction in pay and to retroactively restore appellant to his basic rate of pay as a Distribution Clerk effective December 7, 1985. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay and benefits, as required by Postal Service regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the

amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

FOR THE BOARD: /s/ Rosemary E. Harvey
Administrative Judge

No. 91-423

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL E. HUYGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board has jurisdiction over a Postal Service employee's appeal of a claim that his wages were unlawfully reduced when he elected to become a rural letter carrier.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported, but the decision is noted at 937 F.2d 623 (Table). The order of the Merit Systems Protection Board (MSPB or Board) (Pet. App. A2-A4) is unreported, but is noted at 46 M.S.P.R. 106 (Table). The initial decision of the MSPB (Pet. App. A5-A16) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 11, 1991. The petition for a writ of certiorari was filed on September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Rural Letter Carriers' Association (NRLCA) is the exclusive collective bargaining representative for all rural letter carriers. In 1984, the NRLCA and the Postal Service were unable to agree on the terms of a collective bargaining agreement. In accordance with 39 U.S.C. 1207(c), the dispute was referred to binding arbitration and, in 1985, a panel headed by Arbitrator Volz issued an award determining the terms of an agreement covering the period from 1984 through 1988. Article 9.1.B.1 of this agreement established an entry wage level, known as "Step B," for "all new regular [rural] carrier appointees." [1] Gov't Br. in Opp. at 2, *Kaiser* v. *United States Postal Service*, cert. denied, 111 S. Ct. 673 (1991).

In 1988, the NRLCA and the Postal Service negotiated a successor agreement (the Agreement) in which Article 9.1.B.1 was carried forward without change. *Kaiser* Br. in Opp. at 2-3. The NRLCA and the Postal Service have consistently interpreted this contract provision to provide that, with exceptions contained in the Agreement itself, postal employees appointed to positions as rural carriers are to be paid

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[1] Article 9.1.B.1 provided:

> There shall be a new Rural Carrier Evaluated Schedule, which expands each evaluated level to 14 steps by adding two (2) new lower steps. These two (2) lower steps shall be designated Steps B and C (There shall be no Step A.) Effective January 19, 1985, all new regular carrier appointees will begin at Step B, except for substitute rural carriers who convert to regular status. Substitute rural carriers will be converted to regular carrier status at Step 8 or their existing step, whichever is lower, provided, however, that substitutes serving in excess of 90 days on a vacant route at the time of conversion will convert at their existing steps.

initially at the Step B wage level. See *McGarigle* v. *United States Postal Service*, 904 F.2d 687, 691 (Fed. Cir. 1990); Pet. App. A11.

2. In 1987, petitioner, a Postal Service custodian, sought and was offered a position as a regular rural letter carrier. In accordance with the Agreement, petitioner was paid at the Step B wage rate in his position as a rural carrier. Alleging that he had accepted the new position in reliance on the representation of Postal Service officials that he would retain the higher step and salary he had attained as a custodian, petitioner, along with 10 other similarly situated Postal Service employees, initiated grievance proceedings under the Agreement. Pet. App. A7-A8. These grievances were heard and denied by Arbitrator Zumas, who found that, under the Agreement, the employees were required to be paid at the Step B rate in their positions as rural letter carriers. *Id.* at A8; see also Pet. 11-12.

3. Some two years after petitioner began working as a rural carrier, he appealed his Step B wage to the MSPB. Pet. App. A9, A8 n.4. Without addressing the timeliness of the appeal, the MSPB administrative law judge, in an initial decision, dismissed the appeal because the petitioner had not met his burden of proving that the appeal fell within the MSPB's jurisdiction. *Id.* at A9-A10. Relying upon *Lemon* v. *Department of Labor*, 44 M.S.P.R. 43 (1990), the ALJ found that, under 5 C.F.R. 752.401(b)(15), petitioner's challenge to the change in his rate of pay was not within the Board's jurisdiction. As the ALJ observed, that regulation provides that a reduction in pay from a rate that is "contrary to law or regulation" is not an "adverse action" appealable to the MSPB. Pet. App. A12. The ALJ noted that it was "essentially undisputed" that Article 9.1.B.1 of the

negotiated Agreement required that rural letter carriers in petitioner's position be paid at the Step B rate. *Id.* at A11. The ALJ also observed that the MSPB treats such negotiated agreements "in the same manner as agency regulations." *Id.* at A12 n.9. The ALJ concluded that, "[b]ecause the rate promised to the [petitioner] was contrary to the negotiated agreement, adjustment of that pay to the rate mandated by the agreement cannot be considered an adverse action" appealable to the MSPB. *Id.* at A12.[2]

4. On September 27, 1990, the MSPB denied a petition for review of the initial decision, Pet. App. A2-A4, and, on June 11, 1991, the court of appeals affirmed the MSPB order. *Id.* at A1.

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[2] The ALJ also noted that, although the Zumas Arbitration Award was not entitled to collateral estoppel effect, it was entitled to Board deference and would be set aside only where petitioner showed that the arbitrator erred in interpreting civil service law, rules, or regulations. The arbitrator made no such error. Pet. App. A11 n.8.

The ALJ also rejected petitioner's argument that Section 424.221 of the Postal Service's Employee and Labor Relations Manual mandated that he receive a higher rate of pay than the Step B wage. The judge observed that petitioner had failed to provide a copy of the cited provision, and also noted that another provision of the Manual appeared to give the Postal Service discretion in setting the pay level for rural carriers. Pet. App. A11-A12 n.8.

ARGUMENT

The court of appeals correctly upheld the MSPB's determination that it lacked jurisdiction to hear petitioner's appeal challenging his rate of pay as a rural letter carrier. The court's determination does not conflict with any decision of this Court or the courts of appeals. On the contrary, the decision follows directly from a previous decision of the Federal Circuit addressing the same issue, see *McGarigle* v. *United States Postal Service*, 904 F.2d 687, 691 (1990), and is consistent with other decisions that have rejected challenges to the application of Article 9.1.B.1.[3] Further review is not warranted.

1. a. As in this case, the MSPB in *McGarigle* determined that it lacked jurisdiction over an appeal by a postal employee who had accepted a position as a rural letter carrier concerning a reduction in his rate of pay to the Step B rate. In upholding that ruling, the Federal Circuit noted that Article 9.1.B.1 of the Agreement—the same provision at issue in the instant case (see note 1, *supra*)—clearly applied to postal employees who had transferred from other jobs to the position of rural letter carrier, and not just to new hires. Noting that Article 9.1.B.1 of the Agreement prescribes the Step B rate as the base pay for

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[3] Based on the determination that 39 U.S.C. 1006 of the Postal Reorganization Act does not give rise to an implied right of action, two courts of appeals have dismissed challenges to the application of the Step B wage rate to postal employees that become rural carriers. See *Glenn* v. *United States Postal Service*, 939 F.2d 1516 (11th Cir. 1991); *Kaiser* v. *United States Postal Service*, 908 F.2d 47 (6th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991). See also *McGarigle* v. *United States Postal Service*, 904 F.2d at 691-692 & n.7.

"new regular carrier appointees," the court acknowledged that that phrase is "subject to more than one reasonable interpretation." 904 F.2d at 691. The court observed, however, that "[b]oth parties to the Agreement testified" as to the meaning of the contract language, and that both agreed that the provision covered postal employees transferring from non-rural carrier positions. *Ibid.* The *McGarigle* court also rejected the contention that a higher rate of pay was fixed by Section 424.221 of the Employee and Labor Relations Manual, which states that a postal employee is not required to accept a pay cut upon reassignment to a rural carrier position. The court noted that, under Article 19, § 1 of the Agreement between the NRLCA and the Postal Service, "the Agreement must control" in the event of any conflict between the Agreement and pre-existing Postal Service manuals or published regulations. 904 F.2d at 691 & n.6. Therefore, the rate of pay for the postal employee in that case was controlled by Section 9.1.B.1 of the Agreement, which required that he be paid at the Step B rate.

The Federal Circuit in *McGarigle* concluded, as it did here, that the MSPB lacked jurisdiction over a challenge to a rural letter carrier's reduction in pay to the level mandated in the Agreement. Because the rate from which the salary had been reduced was contrary to the Agreement, it was unlawful. Under 5 C.F.R. 752.401(b)(15), a reduction in pay from an unlawful rate is not an "adverse action" appealable to the MSPB. 904 F.2d at 691.

b. The analysis in *McGarigle* applies with full force here. Not every unfavorable administrative action—and not every reduction in pay—constitutes an adverse action appealable to the Board. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9 (Fed. Cir.

1985). Although changes in an employee's grade or pay level are generally classified as adverse personnel actions appealable to the Board, see 5 U.S.C. 1205, 7701, 7511(a)(1), 7512, 7513(d),[4] regulations prom-

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[4] Section 1205 of Title 5, U.S.C., provides in pertinent part:

> (a) The Merit Systems Protection Board shall—
>
> (1) hear, adjudicate or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
>
> * * * * *

Section 7511(a)(1), 5 U.S.C., in pertinent part, defines an "employee" as:

> (B) * * * a preference eligible in the United States Postal Service * * * who has completed 1 year of current continuous service in the same or similar positions;

Section 7512, 5 U.S.C., provides, in pertinent part, that the adverse personnel actions covered by the subchapter in which it is found include:

> * * * * *
>
> (3) a reduction in grade;
>
> (4) a reduction in pay; and
>
> * * * * *

Section 7513(d), 5 U.S.C., provides:

> An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Proteciton Board under section 7701 of this title.

Section 7701, 5 U.S.C., provides, in pertinent part:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—
>
> (1) to a hearing for which a transcript will be kept; and

[Continued]

ulgated under the Civil Service Reform Act specifically exclude from this category challenges to a pay reduction from a rate that is contrary to law or regulation. See 5 C.F.R. 752.401(b). The MSPB in this case determined that it was unlawful for the Postal Service to pay petitioner at a higher rate than the Step B level because the negotiated Agreement mandated that he be paid at the Step B rate. Because petitioner challenged a reduction from a rate of pay that was contrary to a negotiated Agreement, the MSPB had no jurisdiction over the appeal.

c. Petitioner argues that, notwithstanding the parties' interpretation of the Agreement, Section 9.1.B.1 does not cover postal service employes such as petitioner who transfer to rural letter carrier positions, but only newly hired employees.[5] Petitioner's attack (Pet. 17-20) on the Board's interpretation of the scope of Section 9.1.B.1 is unavailing. The intent of the parties fixes the meaning of the terms of a labor

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[4] [Continued]

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * * * *

[5] Petitioner relies for this construction on the preliminary decision of the MSPB administrative law judge in *Stennis* v. *United States Postal Service*, see Pet. App. A17-A36, which held that the rate of pay prescribed in Section 9.1.B.1 of the Agreement does not apply to postal employees reassigned to rural carrier positions. Petitioner's reliance is misplaced. An unreviewed initial decision of the MSPB has no precedential value. Even if it did, that decision was superseded by the Federal Circuit's subsequent decision in *McGarigle*, which repudiated the construction of Section 9.1.B.1 adopted in *Stennis*.

agreement as long as that interpretation is not contrary to law. *Gamble* v. *United States Postal Service*, 48 M.S.P.R. 228, 232 (1991). Here, both parties to the contract agreed that Section 9.1.B.1 prescribes the rate of pay for employees in petitioner's position. Pet. App. A11; *McGarigle*, 904 F.2d at 691. Petitioner has pointed to nothing in the Postal Reorganization Act that would preclude construing the Agreement to cover him.[6]

2. a. Petitioner complains at length (Pet. 22-28) about the failure of the MSPB to hold a hearing on jurisdiction, claiming that he was denied an opportunity to show "factual differences," or to "develop a record" pertinent to resolution of that issue. As the ALJ in this case noted, petitioner's request for a hearing was initially rejected because he failed to allege facts which, if proven, would establish Board jurisdiction. Pet. App. A7 n.2. Petitioner does not cure that defect here. The Board's determination that it lacked jurisdiction rests on a question of contract interpretation: whether the negotiated Agreement mandates that petitioner be paid at the Step B rate

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[6] Petitioner contends that interpreting the Agreement to permit the Postal Service to reduce petitioner's pay to the Step B level is "contrary to the mandate of 39 U.S.C. 1006." Pet. 15 n.8. It is not. That provision makes Postal Service employees "eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified" and directs responsible officials to exercise their authority to grant promotions or transfers so as "to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services." Section 1006 thus consists of general directives designed to facilitate the career mobility of federal workers. It does not entitle any employee to a transfer on any particular terms or at any specific rate of pay.

rather than at the rate from which his pay was reduced. Petitioner does not show how that purely legal issue turns on factual questions that might be resolved at a hearing.

b. Petitioner also claims (Pet. 29-32) that a hearing should have been held to consider whether he is entitled to estop the government from reducing his rate of pay. As petitioner notes, it is "undisputed on the record" that, at the time petitioner was considering transferring to the rural letter carrier position, Postal Service officials told him that his pay would remain at its previous levels. Pet. 29. He points to no facts in dispute that are pertinent to the estoppel issue. In any event, petitioner is not entitled to estoppel against the government. In entering into the Agreement setting petitioner's pay at the Step B rate, the Postal Service exercised its statutory power to "fix the compensation and benefits of all officers and employees in the Postal Service." 39 U.S.C. 1003. There can be no estoppel against the government to effect the disbursement of funds in excess of the amount that the Postal Service is authorized to pay in the exercise of its statutory authority. See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45212